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DISCUSSION RESPONSE

"P" for Partnership or "R" for Regime?

A Pamphlet on TTIP and the Fragmentation of International Law

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A response to Maximilian Oehl and Jelena Bäumler

In their attentive and stimulating posts, Maximilian Oehl and Jelena Bäumler considered the condition of the WTO and the role of public debate for TTIP differently. My intention is to take a step back and to reflect on the "important questions relating to the framing of the debate" as Maximilian Oehl put it.

Maximilian Oehl started his text spelling out the abbreviation TTIP (Transatlantic Trade and Investment

Partnership). But why is it called “Partnership” and not “Treaty”? Besides the perhaps unwished acronym TTIT it could be elucidating to take into account the fragmentation of international law and its theory. Fundamental concerns towards TTIP and the hegemony of the international economic law regime can be analyzed and brought into the debate by linking such a critical examination of TTIP to the reality of fragmentation in international law.

Fragmentation: Various Actors, Various Regimes

There are a wide range of actors referring to international law in their sayings and doings. Not only states, but also non-state actors play a crucial role and participate in international standard setting processes. International law has undergone not only a proliferation in the number and character of actors, but there has also been a substantive fragmentation into different “regimes”. This evaluation of the status of international law was put forward prominently by Gerhard Hafner in a UN record from the year 2000 and Martti Koskenniemi in his report of the study group of the ILC concerning the fragmentation of international law in 2006. Their finding is that every legal regime has its own range and dynamic. It has been taken up since by many scholars and has been discussed widely.

Therefore the main question for fixing a problem effectively in international law nowadays has turned from: What does international law say to the facts of a case, to “which international legal regime should deal with the problem?” Connected to each legal regime are special legal means and tools for settling raised issues. For example the system of collective security is not the appropriate instrument to stop environmental pollution. But legal regimes occasionally

collide with each other and claim validity and force at the same time. TTIP is a case in point.

WTO vs Partnerships?

How does the partnership invoked in the title of TTIP work? Maximilian Oehl's cogent main thesis can be summed up as follows: free trade and investment cooperation will only work well if there is a harmonic relationship in related fields aside from these two. That means the two tumbling great powers expand strategic cooperation in those areas affected by free trade and investment collaboration and protection, such as environmental standards, labor legislation, or consumer protection. The integrative force for partnership is built on this two-sided economic law regime.

In light of fragmentation, the different opinions of Jelena Bäumler and Maximilian Oehl concerning the further role of the WTO within the international economic law regime could be described as just the tip of the iceberg. The functional and regional division of international economic law is an expression for the endeavor of the particular logic of this regime to universalize its own rationality and maximize its regime power. By further fragmenting into global and sub-global regimes, international economic law regime takes the line of the least resistance to fulfill its logic. Thus the WTO and TTIP are different means to advance the same regime purpose. According to this interpretation, the competition of different economic systems turns out to be just an observation of the rules of the game set by the regime. With this more general view, a critique of TTIP may also be lifted to another level.

International Lawyers as "Miserable Comforters"

In his article Miserable Comforters ("leidige Tröster"), alluding to Kant's famous treatise Perpetual Peace, Martti Koskenniemi applied such a view and came to the conclusion: "The world of regimes is a world of hegemony, of pure power." Like Kant, Koskenniemi advances the opinion that international law is the origin for many frustrations. And Heinhard Steiger went so far as to claim that Kant himself was a denier of international law. If Kant's resentment refers to abusing international law in order to justify war and power politics at his time, Koskenniemi tackles a hierarchical world order and hegemonic interstate relations. The regime conflicts and legal collisions reflect a hidden struggle between different interests and logics in global society. International lawyers habitually apologize for this world order with reference to valid legal rules governing international relations.

Hegemonic Corollaries

The public concerns related to TTIP about for instance the decreasing protection for employees, dangerous genetically modified corn, or declining environmental standards express the fear of universal hegemonic rationalization caused by the international economic law regime. Food safety, environmental protection or employment standards could be absorbed into the particular logic of the international economic law regime that exclusively endeavors to maximize profits. TTIP-critics also address these hegemonic corollaries in terms of a threat to democracy (see e.g. STOP-TTIP or Global Justice Now).

Each legal regime strives for maximization of its own rationality ("Eigenrationalitätsmaximierung") as Andreas Fischer-Lescano and Gunter Teubner pointed out with

reference to Niklas Luhmann. A legal regime universalizes its own particular logic with the support of the general abstract language of international law and thus penetrates more and more legal fields.

The way in which the legal question is posed by international lawyers in dispute settlement with regard to e.g. the precautionary principle already articulates lucidly the priority of that regime in case of collision with others. Under free trade policies lawyers do not ask whether the trading in a particular food is a legitimate interest to accept a possible health hazard for human beings. Instead the question is put in that way: Does a presumptive, in its extent uncertain risk for human health justify a restriction of free trade? More democratic participation in the risk management and assessment process under the WTO Agreement on Sanitary and Phytosanitary Measures has already been proposed by some authors as an example for developments towards balancing this one-sidedness in legal treatment.

Politicizing Legal Regimes

From such an interpretative viewpoint, the international economic law regime favors the principle of free trade as opposed to and in the same time looking for balance with the precautionary principle. Samantha Besson characterizes the traditional philosophical supposition of international law-making as identifying principles with natural law and criticizes it. It is from this contested assumption that principles, such as the principle of free trade and the precautionary principle as its counterprinciple, appear from nature with a shine of immutability. One of the most famous representatives of the critical legal studies movement, Roberto Unger, has shown that the endurance of the

international economic law regime arises from the dialectics of principle and counterprinciple. At the same time this perpetuates its appearance as immutable. Nevertheless principles are alterable, first and foremost through the political process.

So I think Jelena Bäumler and others are partly right: in the end TTIP is a political choice. But it is a political choice in a given frame strongly influenced by the languages and logics of legal regimes, especially the international economic law regime. Considering TTIP as a real political choice does not mean, to paraphrase the author and poetess Ingeborg Bachmann, to adopt certain regime languages in order to assess chances and opportunities resulting from this political decision. Rather it is necessary to examine and revise critically the language in public debates to break the hermeneutic circle described by Maximilian Oehl. Our important task as legal scholars is to contribute to that. Such constant revisions are essential to acquaint oneself with new perceptions, ways of thinking, and feelings to extend one's own reasoning and enable options for future actions.

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